Special Appeal (Civil) No.32/1991
Ganesh Narain Podar ***Versus***
Official Liquidator of M/s Jaipur Sinning &
Weaving Mills Ltd. & Others.
(in SB Co. Appl.No.15/1989)
Date of Order ::: 21//09//05

Hon'ble Mr. Justice V.K.Bali
Hon'ble Mr. Justice Ajay Rastogi

Mr. R.C.Joshi, for appellant (Non-applicant),
Mr. G.K.Garg, for respondent (O.L.)

(Ajay Rastogi, J.)

Instant special appeal has been filed by non-applicants against order dt.19/04/91 passed by learned Single Judge in Company Application No.15/89, whereby preliminary objection raised by appellant with regard to filing of application U/s 543(1) of the Companies Act, 1956 ("***the Act***") being time barred, was over-ruled.

Brief facts, relevant for present controversy, are that M/s Swadeshi Polytex Ltd. Gaziabad moved an application for winding up of a Company - M/s Jaipur Spinning & Weaving Mills Ltd.("***Company***"), which was wound up vide order dt.02/12/83. Official Liquidator attached to this Court was appointed as Liquidator of the Company. The Official Liquidator filed Application No.15/89 on 01/12/89 U/s 543(1) of the Act for seeking direction for inquiry to be made and for passing appropriate orders against non-applicants (appellant) to compensate the Company in liquidation for loss, together with interest @ 18% p.a. on account of their misconduct, misfeasance etc.

Notice was issued by Company Judge on aforesaid application on 15/12/89. Reply to the application was filed by the appellant, and raised a preliminary objection that application U/s 543(1) of the Act filed by

the applicant is barred by limitation, which provides five years period of limitation commencing from the date of order of winding up. And therefore, prayed that the application filed by Official Liquidator be held incompetent and dismissed as time barred.

Learned Company Judge, after taking note of S.543(2) read with S.458A of the Act, came to the conclusion that total period of limitation provided under the Act is 5 years from the date of winding up order besides exclusion of one year following the date of winding up order, and thus considered the application within limitation. Hence this special appeal.

Shri R.C.Joshi, Counsel for appellant urged that winding up order was passed on 02/12/80 and application U/s 543(1) of the Act for misfeasance has been filed after five years from the date of winding up order, and the period of limitation for exclusion as provided U/s 458A of the Act has wrongly been extended because S.458A starts with ***non obstante clause*** and extension of one year will not be applicable in respect of application for which a special provision, has been enacted by legislature under the Act, itself, and has reiterated the very submissions made before the Company Judge.

Shri G.K.Garg, Counsel for Official Liquidator contended that by virtue of S.458A of the Act, in computing period of limitation, the period from the date of commencement of the winding up of the company to the date of winding up order and a period of one year immediately following the date of winding up order have to be excluded in term of S.458A and the learned Company Judge has not committed any error in over-ruling a

preliminary objection, and has placed reliance upon decision in ***Ashoka Autoa & General Vs. Inder Mohan Puri (2005(124) Company Cases (Delhi) 422***), in support of his contention.

We have considered rival submissions of both the parties and also perused material on record. S.458A has been incorporated by amendment in the Act, 1956, for exclusion of certain time in computing periods of limitation. S.458A reads as under : -

> "***458A. Exclusion of certain time in computing periods of limitation -*** ***N****otwithstanding* anything in the Indian Limitation Act, 1908 (9 of 1908) or in any other law for the time being in force, in computing the period of limitation prescribed for any suit or application in the name and on behalf of a company which is being wound up by the Tribunal, the period from the date of commencement of the winding up of the company to the date on which the winding up order is made(both inclusive) and a period of one year immediately following the date of the winding up order shall be excluded."

S.458A starts with ***non obstante clause*** for purposes of computing period of limitation prescribed for any suit or application moved in the name & on behalf of a Company which is being wound up, and in this regard, period from the date of commencement of winding up of the company till the date of winding up order (both inclusive) and secondly a period of one year immediately following the date of winding up order, have been excluded, as specifically provided U/s 458A of the Act.

S.543(2) provides period of limitation for application moved U/s 543(1) of the Act. It reads as

under :-

> "(2) An application under sub-section(1) shall be made within ***five years from the date of order for winding up*** or of the first appointment of the liquidator in the winding up, or of the misapplication, retaining, misfeasance or breach of trust, as the case may be, ***whichever is longer***."

S.543 confers power upon Tribunal to assess damages against delinquent directors, etc., on the application of the Official Liquidator, or the liquidator or of any creditor or contributory,made within the time specified in sub-section(2) and to examine into the conduct of the person, director, manager, liquidator or officer aforesaid compel him to repay or restore the money or property or any part thereof or to contribute such sum to the assets of the Company by way of compensation in respect of misapplication, retainer, misfeasance or breach of trust. 5 years' period of limitation is provided U/s 543(2) and this period shall commence from the date of winding up order or of the first appointment of the liquidator in the winding up, or of the misapplication, retainer, misfeasance or breach of trust, as the case may be, *whichever is longer*.

Object of enactment of S.458-A has been restated by Apex Court in ***Karnataka Steel &Wire Products Vs. Kohinoor Rolling Shutters & Engg. Works (2003(1) SCC 76). It*** merely excludes the period during which a company was being wound up by the court from the date of the commencement of the winding up till the date order of winding up is made and additional period of one year immediately following the date of winding up. By an amendment, the legislature has enacted and inserted

S.458A in the Act so that an official liquidator who is custodian of the assets and liabilities of the company would be able to file a claim on behalf of the Company, which was legally enforceable on the date of winding up, after excluding the period indicated U/s 458A of the Act thereby the Company or its share holders may not suffer any loss. The Apex Court however concluded as under :-

> "In other words, in respect of a legally enforceable claim, which claim could have been made by the Company on the date on which the application for winding up is made, could be filed by the official liquidator by taking the benefit of Section 458-A of the Companies Act and getting the period of four years to be excluded from the period of three years as provided under Article 137 of the Limitation Act."
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> "But, by no stretch of imagination, the said provisions contained in Section 458A can be construed to mean that even a barred debt or a claim which was not enforceable on the date of the winding up, would stand revised, once a winding up application is filed and order is made by virtue of Section 458-A of the Companies Act."

It is true that S.543(2) of the Act provides limitation of five years from the date of winding up order or of the first appointment of a liquidator, to assess damages against delinquent directors.

However, on a conjoint reading of ***S.458A***, which starts with a *non obstante clause* with the expression "*notwithstanding anything in the Indian Limitation Act or any other law for the time being in force", with* ***S.543(2)*** which ended with expression, *"whichever is longer", it* clearly indicates that the period of limitation will commence from the date of commencement of winding up of the company till the date of winding up order (both

inclusive) and an additional one year immediately following the date of winding up order shall be excluded, and thereby Section 458A is applicable to application moved U/s 543(1) for exclusion of certain time in computing the periods of limitation.

In instant case, proceedings were initiated on application moved U/s 543(1) of the Act on behalf of Company in liquidation by Official Liquidator on 01/12/89 while winding up order was passed on 02/12/83, which is within a period of six years as provided U/s 543(2) read with S.458A of the Act. In view of the mandate under the Act coupled with legislative intent, in our considered opinion, exclusion of time in computing period of limitation provided U/s 458A of the Act is in addition to five years period of limitation provided U/s 543(2) of the Act, we are in full agreement with the view expressed by Delhi High Court in A***shoka Auto & General Vs. Inder Mohan Puri (supra)*** that claim by the official liquidator U/s 543 being a claim by the Company, even if Section 543 states that the five year period is to commence from the date of winding up order, S.458A of the Act would be applicable and the benefit of one additional year as provided in the said provision would be available for proceedings U/s 543 of the Act. Hence we find no error in the order dt.19/04/99 of the Company Judge in over-ruling the preliminary objection raised by the appellant.

Consequently, this special appeal fails and is hereby dismissed with no order as to costs.

(Ajay Rastogi), J. (V.K.Bali), J.

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